Grandeur Holdings Sdn Bhd v Chong Kim Leong & Anor

HIGH COURT (MELAKA) — PETITION NO 26–9 OF 2000
LOW HOP BING J
14 OCTOBER 2005

Civil Procedure — Judgments and orders — Setting aside, application for — Proper mode of application — Whether by way of summons in chambers or by notice of motion — Whether merely a technical point — Whether application should be considered on its merits — Legal Profession Act 1976 s 130(3)

The respondents were solicitors for the petitioner in a transaction. When they failed to deliver a bill of cost for the professional services rendered in the said transaction to the petitioner, the petitioner filed an originating summons which was subsequently heard on 30 November 1999 and the respondents were ordered to deliver a bill of costs to the petitioner. On 27 December 1999, the respondents delivered the bill of costs to the petitioner. Vide the court's letter of 22 December 2000 to the petitioner's solicitors which was copied to the respondents, the petitioner's solicitors were required to produce the order of the court made in the originating summons before the court could fix the hearing date for the bill of costs for taxation. The respondents deposed in their affidavit that they had no knowledge of the petition as it had never been served on them. The respondents' filed an application by way of summons in chambers in encl 11 for, inter alia, an order that the orders given by the judge on 1 September 2000 and 1 March 2001 ('the impugned orders') be set aside with costs. The learned counsel for the petitioner submitted that the proper mode of the respondents' application herein should be by way of notice of motion and not summons in chambers.

Held, dismissing the application (encl 11) with costs:

(1) On the basis of s 130(3) of the Legal Profession Act 1976 and applying and adopting the procedure in England, the court held that the proper mode of application is not by summons in chambers but by notice of motion. However, there was no submission made by the petitioner in reference to any prejudice or miscarriage of justice which the petitioner is likely to suffer due to the wrongful mode of application. Therefore the court held this procedural point is highly technical in nature (see paras 30–31).

(2) Following *Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1 at p 5 and pursuant to O 2 r 3 of the Rules of the High Court 1980, the court shall by any party to any cause, matter or proceedings only on the ground of non-compliance with any of these rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice (see para 34).

[Bahasa Malaysia summary

Responden-responden adalah peguamcara kepada pempetisyen di dalam satu transaksi. Apabila mereka gagal memgemikakan satu bil untuk kos bagi khidmat professional yang diberikan di dalam transaksi tersebut kepada pempetisyen, pempetisyen memfailkan satu saman pemula yang mana telah didengar pada 30 November 1999 dan responden-responden diarahkan untuk mengemukakan bil untuk kos kepada pempetisyen. Pada 27 Disember 1999, responden-responden telah mengemuakan bil untuk kos kepada pempetisyen. Melalui surat mahkamah bertarikh 22 Disember 2000 kepada peguamcara pemtisyen, yang mana disalin kepada responden-responden, peguamcara pempetisyen dikehendaki untuk mengemukakan perintah mahkamah yang dibuat dibawah saman pemula tersebut sebelum mahkamah boleh mentapkan tarikh bicara untuk taksiran bil untuk kos tersebut. Responden-responden di dalam affidavit mereka mendeposkan bahawa mereka tidak mempunyai pengetahuan mengenai petisyen tersebut kerana ianya tidak pernah diserahkan ke atas responden-responden. Responden-responden memfailkan satu permohonan melalui saman dalam kamar (lampiran 11) untuk, antara lain, satu perintah baahwa perintah-perintah yang diberikan oleh hakim pada 1 September 2000 dan 1 Mac 2001 diketepikan dengan kos. Peguamcara kepada pempetisyen menghujahkan bahawa cara sebenar permohonan responden-responden dibuat adalah melalui notis usul dan bukannya saman dalam kamar.

Diputuskan, menolak permohonan (lampiran 11) dengan kos:

(1) Berasaskan s 130(3) Akta Profesyen Undang-Undang 1976 dan menggunapakai serta menyerap prosedur di England, mahkamah memutuskan bahawa cara yang betul untuk permohonan ini adalah melalui notis usul dan bukannya saman dalam kamar. Walau bagaimanapun, tiada sebarang hujah dibuat oleh pempetisyen yang mengatakan pempetisyen akan diprejudiskan atau salah laksana undang-undang akan berlaku disebabkan oleh penggunakan permohonan yang salah. Oleh yang demikian mahkamah memutuskan bahawa hujahan prosedur ini adalah sesuatu yang teknikal (lihat perenggan 30–31).

(2) Mengikut *Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1 di ms 5 dan menurut A 2 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980, mahkamah tidak akan membenarkan sebarang bantahan awal yang dibuat oleh mana-mana pihak, perkara atau prosiding hanya pada alasan ketidakpatuhan dengan peraturan-peraturan ini melainkan mahkamah atau hakim berpendapat yang ketidakpatuhan ini telah menyebabkan satu salah laksana undang-undang yang besar (lihat perenggan 34).]

Notes

For cases on application for setting aside, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 3789–3811.

Cases referred to

Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh [2005] 7 CLJ 1 (folld)
Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan [2002] 6 MLJ 134 (refd)

Feedmeal Malaysia Sdn Bhd v Teh Cho Yeow & Ors [2003] 6 MLJ 19 (refd)
Koperasi Belia Nasional Bhd v Dublee Holdings Sdn Bhd para 1410 Mallal's Digest Vol 2 (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)
Megnaway Enterprise Sdn Bhd v Soon Lian Hock [2003] 5 CLJ 103 (refd)
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)
Perusahaan Petanda Bintang Sdn Bhd v Asbir Hira Singh & Co [1995] 2 MLJ 455 (refd)
Phua Choon Hwang & Anor v Hassan & Kong Yeam [1987] 1 MLJ 156 (refd)
Terrance Simon Marbeck v Kerajaan Malaysia [2003] 6 CLJ 120 (refd)

Legislation referred to
Legal Profession Act 1976 ss 126, 130
Rules of the High Court 1980 O 2 r 3, O 8 r 2, O 32 r 1

CC Aiyathurai (CC Aiyathurai & Co) for the plaintiff.
LK Tiu (Koh Kim Leng & Co) for the defendant.

Low Hop Bing J:

APPLICATION

[1] This is the respondents' application by way of summons in chambers in encl 11 filed on 19 April 2001 for, inter alia, an order that the orders given by KN Segara J on 1 September 2000 and 1 March 2001 ('the impugned orders') be set aside with costs.

FACTUAL BACKGROUND

[2] A narrative of the relevant factual background may be unfolded as follows:

[3] Pursuant to s 130 of the Legal Profession Act 1976, vide petition of course dated 21 July 2000 in encl 1 filed on 15 August 2000, the petitioner prays for an order that the bill of costs be taxed.

[4] Unless the context otherwise requires, a reference hereinafter to a section is a reference to that section in the Legal Profession Act 1976.

[5] Sometime in February 1994, the petitioner appointed the respondents who are advocates and solicitors practising as Koh Kim Leng & Co to act as the petitioner's solicitors in respect of the sale of properties held under Lot Nos 1550, 1552, 1553, 1554, 68, 740 and 742 in the mukim of Tanjong Minyak, Melaka ('the properties') by the petitioners to Sierraview Sdn Bhd, as contained in the sale and purchase agreement executed on 14 August 1995.

A **[6]** Upon completion of the sale and purchase transaction on 25 July 1996, the respondents allocated to themselves a sum of RM305,000 being fees thereof and also an additional sum of RM1,206,000 being a bonus which is 3% of the profit derived from the transaction.

B **[7]** Vide letters dated 25 April 1998, 2 May 1998, 9 June 1998 and 18 July 1998 issued by the petitioner's then solicitors Taye & Co, the petitioner requested the respondents to deliver a bill of costs for professional services rendered in the transaction.

C **[8]** Upon the respondents' failure to do so, the petitioner filed Melaka High Court Originating Summons No 24–367 of 1998 ('the originating summons') which was subsequently heard on 30 November 1999 when the respondents were ordered to deliver a bill of costs to the petitioner.

D **[9]** On 27 December 1999, the respondents delivered the bill of costs to the petitioner.

[10] The respondents deposed in their affidavit in encl 12 that the petition in encl 1 and the affidavit in support in encl 2 had never been served on them and they only knew of the existence of the petition and the affidavit when they received from
E the court a copy of the letter dated 22 December 2000 which was addressed to the petitioner's present solicitors, CC Aiyathurai & Co requiring the petitioner's solicitors to produce the order of the court made in the originating summons before the court could fix the hearing date for the bill of costs for taxation.

F **[11]** The court vide letter dated 5 February 2001 informed the respective solicitors for the parties herein that the bill of costs for taxation had been fixed for hearing on 21 March 2001.

[12] On 21 March 2001, the respondents were represented by one Miss Lim Lee
G Hoon who informed the court that the respondents had not been served with the petition of which they had no knowledge.

[13] The learned registrar then fixed the bill of costs for taxation for hearing on 19 April 2001.

H **[14]** Meanwhile, on 23 March 2001, the respondents conducted a file search and obtained a copy of the petition and the affidavit in support.

[15] As the respondents were allegedly unsure of the notes of proceedings of the court, they sought clarification from the learned registrar but to no avail.
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[16] On 27 March 2001, the respondents filed a notice of appeal to judge in chambers ('the appeal') against the decision of the learned registrar made on 21 March 2001 fixing the bill of costs for taxation for hearing on 19 April 2001. The appeal had been fixed for hearing on 16 July 2001.

[17] On 14 April 2001, the respondents received a letter dated 12 April 2001 together with a draft order dated 1 September 2000 from the petitioner's solicitors requesting the respondents to approve it within two days. The terms of the draft order stated to be made by KN Segara J are in essence to the effect that the bill of costs be referred to the registrar for taxation, and the order was made in the absence of the parties and their respective counsel herein.

[18] As the respondents were allegedly unaware of the terms of the said draft order, they did not approve it but instead vide letter dated 17 April 2001 suggested that an appointment be made with the learned judge 'to sort out and settle the same'.

[19] The respondents then wrote a letter dated 4 April 2001 to the registrar stating that as the appeal had been fixed for hearing on 16 July 2001, the taxation of the bill of costs fixed for hearing on 19 April 2001 should be postponed pending the hearing of the appeal.

[20] On 14 April 2001, the respondents received a letter dated 13 April 2001 from the petitioner's solicitors stating that an order dated 1 March 2001 had been made by the learned judge against the respondents, again in the absence of the parties and their respective counsel herein.

[21] A second bill of costs was delivered by the respondents to the petitioner on 19 April 2001 pursuant to the registrar's order made on 21 March 2001.

[22] On 14 June 2005, the appeal had been withdrawn by the respondents.

PROPER MODE OF APPLICATION

[23] Learned counsel Mr CC Aiyathurai submitted for the petitioner that the proper mode of the respondents' application herein should be by way of notice of motion, citing *Halsbury's Laws of England* (4th Ed) Vol 44 para 197 ('*Halsbury*'s para 197').

[24] In response, Mr LK Tiu, learned counsel for the respondents submitted that the respondents' application by way of summons in chambers in encl 11 is the correct procedure on the basis of s 126(2).

[25] In my judgment, the proper mode of application is of special significance and would require my consideration now, in the light of s 130 which reads:

> 130 Order for delivery of solicitor's bill of costs by way of petition
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> (1) An order for the delivery of a solicitor's bill of costs, and for delivery up of any deeds, documents or other papers in the possession of the advocate and solicitor may, subject to any lien which such advocate and solicitor may have, and for the taxation of the bill when delivered, be obtained on a petition of course.
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> (2) Upon the petition being filed, the Registrar shall mark the order thereon forthwith, and draw up the order if necessary.

A (3) Subject to this section, the court shall have the like jurisdiction as the High Court in England to make an order under subsection (1)

[26] It is pertinent to point out that the impugned orders were made in the petition pursuant to s 130 and not under s 126 which the respondents have relied upon.

[27] Section 126(2) specifically provides that any party aggrieved 'by any order of court' may apply by summons in chambers that the same may be eg set aside. The expression 'any order of the court' contained in s 126(2) must in my view be an order made under s 126 and not under s 130 because s 130 does not contain a corresponding provision. However, s 130(3) does clarify that our court shall have the like jurisdiction as the High Court in England to make an order under s 130(1) (see also *Perusahaan Petanda Bintang Sdn Bhd v Asbir Hira Singh & Co* [1995] 2 MLJ 455 at p 462D–E per Vincent Ng J).

[28] That being the case, I shall look for inspiration in England to ascertain the proper mode of making the instant application.

[29] *Halsbury*'s para 197 sets out the relevant passage as follows:

E 197 Procedure where incorrect form of application has been made in the Chancery Division

An order obtained ex parte in the Chancery Division which should not have been so obtained may be discharged, and as a rule will be discharged with costs, although the court may deal with it on the merits. Application to discharge the order is made by motion, the notice of which must state the objections to the order

[30] On the basis of s 130(3), as alluded to above, I hereby apply and adopt the procedure in England, as a result of which I hold that the proper mode of application is not by summons in chambers but by notice of motion.

[31] Be that as it may, it is also to be noted that notwithstanding the wrong mode of application in the instant case, the submission presented for the petitioner does not refer to any iota of prejudice or miscarriage of justice which the petitioner is likely to suffer by reason of the respondents having filed the summons in chambers instead of the notice of motion. The procedural point is in my view highly technical in nature.

[32] An application by way of summons in chambers is governed by O 32 r l while a notice of motion is regulated by O 8 r 2 of the Rules of the High Court 1980. These rules provide for the vehicles for the purposes of obtaining the necessary prayers according to the rights and obligations of the parties under the law. These rules should not be rendered ineffective by highly technical objections.

[33] In *Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh* [2005] 7 CLJ 1 at p 5, where the issue raised for the defendant therein was highly technical in nature which had not occasioned a substantial miscarriage of justice, I invoked O 1A of the

Rules of the High Court 1980 which came into force on 16 May 2002. Order 1 A provides that in administering any of the rules herein, the court or a judge shall have regard to the justice of the case and not only to the technical non-compliance with any of the rules herein.

[34] Under O 2 r 3, a court or judge shall not allow any preliminary objection by any party to any cause, matter or proceedings only on the ground of non-compliance with any of these rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice (see also *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; *Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan* [2002] 6 MLJ 134; *Megnaway Enterprise Sdn Bhd v Soon Lian Hock* [2003] 5 CLJ 103; *Terrance Simon Marbeck v Kerajaan Malaysia* [2003] 6 CLJ 120 and *Feedmeal Malaysia Sdn Bhd v Teh Cho Yeow & Ors* [2003] 6 MLJ 19.

[35] Further, in line with the jurisdiction of the High Court in England as stated in *Halsbury*'s para 797, I shall now proceed to consider this application on the merits.

PETITION OF COURSE

[36] It was contended for the respondents that, inter alia, the petitioner had chosen to file the petition under s 130 without serving it on the respondents, the impugned orders should be set aside. Reference was made to:

(1) *Koperasi Delia Nasional Bhd v Dublee Holdings Sdn Bhd*, para 1410 *Mallal's Digest* Vol 2;

(2) *Saemah bte Hj Mahadi v Public Bank Bhd*, *Mallal's Digest on Civil Procedure*, para 3776;

(3) *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374.

[37] The response of the petitioner is that the petitioner had received no copies of the petition from the court for service on the respondents and that the impugned orders had been correctly made in the absence of the parties. Support was sought, inter alia in *Phua Choon Hwang & Anor v Hassan & Kong Yearn* [1986] 1 MLJ 156; *Perusahaaan Petanda Bintang Sdn Bhd*, (*Halsbury's Laws of England* (4th Ed) Vol 37 para 139).

[38] In my judgment, the answer to the aforesaid divergent submissions may be established by a true construction of s 130.

[39] In this respect, judgments which were not concerned with s 130 are unlikely to be of any assistance. Hence, the judgments of Siti Norma Yaakob J (now CJ (Malaya)) in *Koperasi Belia Nasional Bhd* and of Mohamed Dzaiddin J (later Chief Justice Malaysia) in *Phuah Choon Hwang & Anor* in which the issues were confined to ss 126 and 128 only cannot in my view support the respective contentions presented for the parties herein.

[40] The judgment of James Foong J (now JCA) in *Saemah bte Hj Mahadi* is not an authority on a petition of course under the Legal Profession Act 1976; neither is the judgment of the Federal Court delivered by Edgar Joseph Jr FCJ (as he then was) in *Muniandy*.

[41] Having carefully considered the relevant submissions, I am of the view that on the merits the issue for determination is whether the impugned orders were regular and within the jurisdiction of a judge of our High Court

[42] In this regard, s 130(1) enables an order for the delivery of a solicitor's bill of costs to be obtained on a petition of course. This expression is not without significance. *Halsbury*'s para 139 contains the following passage:

> 139 Beginning proceedings by petition
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> A petition is one of the prescribed modes of beginning proceedings in the High Court. It comes before a judge in open court. There is also what is known as a *petition of course which initiates unopposed applications and without any hearing before a judge*. A petition other than a petition of course is sometimes referred to as a 'special petition'.
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> To para 139, the footnote added:
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> Originating *petitions of course* are in common use only under the Solicitors Act 1974, s 70 (application in clear cases for taxation of a solicitor's bill of costs:... For forms, see 36 Court Forms (2nd Ed) (1977 issue) 276, 286, 288, 291 Forms 58, 70, 73, 79.

[43] Relevant to the application before me is Form 58, at p 276 which is intended to be used for a *petition of course* by client for delivery of bill of costs and of papers and for taxation of a bill. It is noted at p 277 that this petition is not required to be served on any person. This is the crux of the *petition of course* ie it may be dealt with by a judge in the absence of the parties.

[44] Section 130(2) specifically provides that upon the petition of course being filed, it is mandatory for the registrar to mark the order thereon forthwith and draw up the order if necessary.

[45] In considering a petition of course under s 130 in *Perusahaan Petanda Bintang*, Vincent Ng J held at p 464B–C that in England, the jurisdiction of the High Court to make orders for the delivery by a solicitor of a bill of costs is extended to cases in which no business has been done by him in the High Court and that by virtue of s 130(3), this court is clothed with the same jurisdiction to make an order for delivery of the same in respect of contentious and non-contentious matters which in my view would include the sale and purchase transaction of the properties in the instant case.

[46] Hence, upon an anxious consideration of the above factual background and the law, I am of the view that the impugned orders are regular and they are within the jurisdiction of a judge of our High Court.

[47] By way of obiter, having had the advantage of a meticulous scrutiny of the entire file, I would like to add that had this petition been placed before me for an inter partes hearing on its merits, in the light of the above factual background and the governing principles of law, I would have invoked the jurisdiction and made an order under s 130.

CONCLUSION

[48] On the foregoing grounds, I hold that the application in encl 11 is devoid of merits and is hereby dismissed with costs.

Application in encl 11 dismissed with costs.

Reported by Izzaty Izzuddin